

No. 11098

United States
Circuit Court of Appeals
For the Ninth Circuit.

STELLA WHEELER BISHOP,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

AUG 12 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

HERMAN PHLEGER, Esq.,
THEODORE R. MEYER, Esq.,
ROBERT H. WALKER, Esq.

For Comm'r:

T. M. MATHER, Esq.

STELLAR WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transferred to Judge Arundell 12/8/44

DOCKET ENTRIES

1944

- Apr. 20—Petition received and filed. Taxpayer notified. Fee paid.
- Apr. 20—Copy of petition served on General Counsel.
- Apr. 24—Request for Circuit hearing in San Francisco filed by taxpayer. 4/25/44 (Granted.
- May 15—Answer filed by General Counsel.
- May 15—Request for hearing in San Francisco, filed by General Counsel.
- May 19—Copy of answer and request served on taxpayer. (San Francisco, Calif.)

1944

- Aug. 10—Hearing set September 18, 1944—San Francisco, California.
- Sep. 18—Hearing had before Judge Van Fossan on merits. Appearances of Robert H. Walker filed. Stipulation of facts filed. Briefs due 10/18/44. No replies.
- Oct. 14—Transcript of hearing 9/18/44 filed.
- Oct. 16—Brief filed by taxpayer.
- Oct. 16—Brief filed by General Counsel. Copy served 10/17/44.
- Nov. 13—Motion for leave to file a reply brief filed by taxpayer. 11/13/44. Granted.
- Nov. 13—Reply brief filed by taxpayer.
- Nov. 14—Copy of motion and reply brief served on General Counsel.

1945

- Jan. 16—Findings of Fact and Opinion rendered. Judge Arundell. Decision will be entered under Rule 50. Copy served 1/17/45.
- Feb. 15—Computation of deficiency filed by General Counsel.
- Feb. 20—Hearing set 3/28/45 on settlement.
- Mar. 28—Hearing had before Judge Arundell on settlement. Decision to be entered in accordance with respondent's computation.
- Mar. 29—Decision entered. Judge Arundell. Div. 6.
- Jun. 15—Bond in the amount of \$2,200.00 approved and filed.
- Jun. 18—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Jun. 18—Proof of service filed.

1945

Jun. 18—Statement of points relied upon on petition for review filed by taxpayer with proof of service thereon.

Jun. 18—Designation of record filed by taxpayer with proof of service thereon. [1*]

The Tax Court of the United States

Docket No. 4594

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, "IRA :90-D, AVD," dated February 29, 1944, and as a basis of her proceeding alleges as follows:

I.

The petitioner is an individual, residing at 2006 Washington Street, San Francisco, California. The return for the period here involved was filed with the Collector of Internal Revenue for the First Collection District of California.

* Page numbering appearing at top of page of original certified Transcript of Record.

II.

The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 29, 1944. This Petition is filed for a redetermination of said [2] deficiency and a determination that petitioner has made an overpayment of tax for the taxable year in respect of which the Commissioner determined the said deficiency, and this Court has jurisdiction thereof by virtue of Sections 272(a) (1) and 322(d) of the Internal Revenue Code of the United States.

III.

The taxes in controversy are income taxes for the calendar year 1940 in the amount of \$1,070.23, claimed in the Notice of Deficiency, and \$1,198.63, claimed herein as a refund.

IV.

The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

1. The Commissioner erred in increasing income from personal services by the sum of \$964.04 due to the receipt by petitioner in 1940 of a fee of \$1,928.09 as executrix of the Estate of Roy N. Bishop, deceased, such fee having been paid from funds in which petitioner had a present and existing interest equal to that of the Estate of Roy N. Bishop, deceased, so that only one half thereof, to wit, the sum of \$964.05, was taxable to petitioner as reported on her return. (Adjustment (a), page 2 of Statement, Exhibit A.)

2. The Commissioner erred in ruling that the deduction of \$8,421.69 claimed by petitioner on her return for the taxable year 1940 as her share of the long-term capital losses [3] from the sale of community property by the Estate of Roy N. Bishop, the deceased husband of petitioner, is not allowable and that such losses were deductible only on the return for the said estate, and in reducing the amount of long-term capital losses reported on said return from \$18,034.99 to \$9,613.30. (Adjustment (c), page 2 of Statement, Exhibit A.)

3. The Commissioner erred in disallowing the deduction of transfer taxes on the sale of securities and automobile taxes paid by said estate, said securities and automobile constituting community property of petitioner and said Roy N. Bishop and said taxes being paid from funds in which petitioner had a present and existing interest equal to that of said estate. (Adjustment (d), page 2 of Statement, Exhibit A.)

4. The Commissioner erred in decreasing dividends received by the said Estate of Roy N. Bishop, deceased, from securities constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop or his said estate, by the amount of \$2,149.55 and in ruling that such dividends were taxable to the estate and not to petitioner. (Adjustment (c) (1), pages 2-3 of Statement, Exhibit A.)

5. The Commissioner erred in decreasing interest on bank deposits and bonds by \$32.15 and

\$100.00, respectively, and in decreasing income taxes paid at the source on tax-free [4] covenant bonds by the sum of \$2.00, said bank deposits and bonds constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop or his estate. (Adjustments (f), (g) and (h) of Statement, Exhibit A.)

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of December, 1938, when said Roy N. Bishop died. Said Roy N. Bishop and petitioner Stella Wheeler Bishop were residents of, and domiciled in the State of California continuously from the year 1909 to the 20th day of December, 1938, in the case of said Roy N. Bishop, and to the present time in the case of petitioner.

(b) On April 20, 1931, July 24, 1937, July 26, 1937, and October 29, 1937, respectively, petitioner and said Roy N. Bishop acquired securities of the kinds and in the amounts set forth in the schedule annexed hereto and marked Exhibit B. Said securities were acquired with funds constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop under Section 161a of the Civil Code of the [5]

State of California, added by Chapter 265 of the California Statutes of 1927, effective July 29, 1937.

(c) Thereafter on December 20, 1938, said Roy N. Bishop died and on January 9, 1939, the Will of said Roy N. Bishop, deceased, was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. Said Will named petitioner and the Crocker First National Bank of San Francisco as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, deceased. The amount of the gross estate of said Roy N. Bishop, deceased, was as reported on his Federal Estate Tax Return filed with the Collector of Internal Revenue for the first California District on March 19, 1940, to wit, \$316,805.05, all of which constituted community property of said decedent and petitioner, as finally determined by the Final Decree of Distribution entered by said Superior Court on July 22, 1940. The aggregate amount of debts owed by said Roy N. Bishop at the date of his said death and for which claims were filed against the Estate of said Roy N. Bishop, deceased, was as shown on said Federal Estate Tax Return, to wit, \$6,382.16. All said debts were paid in full by said estate on or before June 3, 1939.

(d) Thereafter, on March 18, 19, 20, 21 and 28, 1940, April 2, 3 and 4, 1940, and July 11, 1940, respectively, the Estate of Roy N. Bishop, deceased, sold the securities referred [6] to in subdivision (b) of this paragraph of the kinds and for the amounts set forth in the schedule annexed hereto

and marked Exhibit B. In making such sales, said estate incurred the expenses set forth in the sixth column of said Exhibit B. At the time of the sale of said securities, all had been held for more than twenty-four months, as appears from the first column of said Exhibit B. The net proceeds of the sale of such securities were \$33,686.77 less than the cost thereof as appears from the fourth, fifth and sixth columns of said Exhibit B. One half of the amount by which said cost exceeded the net proceeds of the sale of said securities constitutes a loss from the sale of community property in which petitioner had a present and existing interest equal to that of said Roy N. Bishop, and 50% of said loss is recognized and is deductible as a long-term capital loss on petitioner's return for the taxable year 1940, i.e., the sum of \$8,421.69.

(e) During the year 1940 said Estate of Roy N. Bishop, deceased, paid transfer taxes of \$461.48 on the sale of securities constituting community property of said decedent and petitioner and also paid a tax of \$34.00 on an automobile constituting such community property; said securities and said automobile were acquired and said taxes paid with funds constituting community property of decedent and petitioner and in which petitioner had a present and existing interest, equal to that [7] of said decedent therein under the provisions of Section 161a of the Civil Code of the State of California, enacted by Chapter 265 of the California Statutes of 1927, effective July 29, 1927, and one

half of said taxes so paid were therefore deductible by petitioner, to wit, the sum of \$247.74.

(f) During the year 1940 dividends and interest were received by said Estate of Roy N. Bishop from securities in various corporations held by said estate and from bank deposits thereof. Said securities had been acquired and said bank deposits made with funds constituting community property of petitioner and said Roy N. Bishop, and petitioner had a present and existing interest in said dividends and interest equal to that of said Roy N. Bishop therein under Section 161a of the Civil Code of the State of California, added by Chapter 265 of the California Statutes of 1927, effective July 29, 1927. Petitioner correctly reported as income on her 1940 return one half of the dividends so received, to wit, the sum of \$2,149.55; one half of the interest on securities so received, to wit, the sum of \$100.00; and one half of the interest on the bank deposits so received, to wit, the sum of \$32.15, and correctly credited against her tax one half of the sum of \$4.00 withheld at the source on such securities, to wit, the sum of \$2.00.

(g) During the year 1940 petitioner was paid the sum of \$1,928.09 by the Estate of Roy N. Bishop, deceased, as and [8] for a fee as executrix of said estate. Said fee was paid from funds in which petitioner had a present and existing interest, equal to that of said estate, so that only one half thereof, to wit, the sum of \$964.05 was taxable to petitioner as reported on her return for 1940.

(h) During the year 1940 petitioner received from the Pacific Lumber Company a distribution of \$8,850.00, which was reported by petitioner on her said 1940 return as a taxable dividend in full. Thereafter in January, 1944, the Commissioner of Internal Revenue determined that said distribution was 28.495% nontaxable because to that extent it was not declared out of earnings and profits of the taxable year 1940 or those accumulated subsequent to February 28, 1913, and was not a dividend. Hence petitioner's income was overstated on said return to the extent of \$2,521.81 (28.495% of \$8,850.00) as said Notice of Deficiency concedes. (See Statement, page 3, Adjustment (e)(2), Exhibit A.) However, petitioner also excluded from gross income on her 1940 return 5.489902% of a distribution of \$720.00 (\$39.53) received by her on shares of stock of the Kennecott Copper Company constituting her separate property and 5.489902% of one half of a distribution of \$107.50 (\$2.95) received by the Estate of Roy N. Bishop from shares of stock of the Kennecott Copper Company constituting community property of petitioner and Roy N. Bishop, believing such portions to be nontaxable because not constituting dividends. It was subsequently determined by the Commissioner of Internal Revenue that said distributions [9] were 100% taxable. Hence taxpayer understated her 1940 income by \$39.53 and \$2.98, respectively. Petitioner is therefore entitled to a refund of \$1,198.63, as computed in Exhibit C, attached hereto.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine that no deficiency of income tax for the calendar year 1940 is payable by petitioner, but on the contrary that a refund is due petitioner in the amount of \$1,-198.63 taxes paid.

Respectfully submitted,

HERMAN PHLEGER

THEODORE R. MEYER

Counsel for Petitioner. [10]

State of California,

City and County of San Francisco—ss.

Stella Wheeler Bishop, being first duly sworn, says that she is the petitioner above named; that she has read the foregoing Petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

STELLA WHEELER BISHOP

Subscribed and sworn to before me this 14th day of April, 1944.

[Seal]

W. W. HEALEY

Notary Public in and for the City and County of San Francisco, State of California. [11]

My Commission expires March 3, 1946.

EXHIBIT A

Form 1230

SN-IT-1

Office of Internal Revenue Agent
in Charge

San Francisco Division

IRA :90-D

AVD

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, 5, California

Feb. 29, 1944

Mrs. Stella Wheeler Bishop,
2006 Washington Street,
San Francisco, California

Dear Mrs. Bishop:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1940 discloses a deficiency of \$1,-070.23 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and for-

ward it to the Internal Revenue Agent in Charge, San Francisco, 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

HAROLD N. GRAVES,
Acting Commissioner,

By P. N. HARLESS
Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of Waiver.

R.R.

STATEMENT

San Francisco
IRA:90-D
AVD

Mrs. Stella Wheeler Bishop
2006 Washington Street,
San Francisco, California

Tax Liability for the Taxable Year Ended
December 31, 1940

	Liability	Assessed	Deficiency
Income Tax	\$8,939.68	\$7,869.45	\$1,070.23

In making this determination of your income tax liability, it is noted that you did not avail yourself of the privilege of filing a protest.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		\$30,155.91
Unallowable deductions and additional income:		
(a) Salary	\$ 964.04	
(b) Fiduciary income	2.83	
(c) Capital loss	8,421.69	
(d) Taxes paid	247.74	9,636.30
		<hr/>
	Total.....	\$39,792.21
Nontaxable income and additional deductions:		
(e) Dividends	\$4,631.83	
(f) Bank interest	32.15	
(g) Bond interest	100.00	4,763.98
		<hr/>
	Net income adjusted.....	\$35,028.23

EXPLANATION OF ADJUSTMENTS

(a) Income from personal services is increased \$964.04 due to the fact that you received a fee of \$1,928.09 as executrix of the Estate of Roy N. Bishop, Deceased, instead of \$964.05 as reported on your return.

(b) Income from the Roy N. Bishop, Deceased, Trust is increased \$2.83 due to adjustment of the following dividends:

- | | |
|--|---------|
| (1) Kennecott Copper dividend understated..... | \$45.57 |
| (2) Pacific Lumber Company dividend overstated.... | 42.74 |

Adjustment	\$ 2.83
------------------	---------

- (1) Dividends paid by Kennecott Copper Corporation in 1940 are held to be 100% taxable. Therefore the portion eliminated as nontaxable is added back to income.
- (2) The dividend of \$150.00 received from Pacific Lumber Corporation is held to be 28.495% nontaxable. Therefore \$42.74 is eliminated from income.

(e) The deduction of \$8,421.69 which you claim as your share of the long-term capital losses from the sale of community property by the executrix of your deceased husband's estate is not allowable. It is held that these losses are deductible only on the return for the estate. The amount of \$18,034.99 reported on the return is therefore, reduced to \$9,613.30.

(d) Deduction for taxes paid is decreased \$247.74, due to the disallowance of transfer tax of \$230.74 on sale of securities and automobile taxes of \$17.00. These taxes paid on behalf of the Estate of Roy N. Bishop, Deceased, are not deductible on your return.

(e) Dividends are decreased \$4,631.83 due to the following adjustments:

Deductions:

1. Dividends received by your husbands estate	\$2,149.55
2. Pacific Lumber Company dividend.....	2,521.81
	Total.....\$4,671.36

Addition:

3. Kennecott Copper dividend	39.53
	Net adjustment.....\$4,631.81

1. Dividends received by your husband's estate from your share of community property are taxable to the estate and not to you.
2. The dividend of \$8,850.00 received from the Pacific Lumber Company is held to be 28.495% nontaxable. Therefore \$2,521.81 is eliminated from taxable income.
3. Inasmuch as the dividends paid by Kennecott Copper Corporation in 1940 were 100% taxable the amount of \$39.53 which you eliminated as nontaxable is restored to income.

(f) Interest on bank deposits is decreased \$32.15 due to the fact that the amount received by your husband's estate from your share of community property is not taxable to you.

(g) Interest on bonds is decreased \$100.00, the amount received by the estate of your husband which is not taxable to you.

(h) Income tax paid at source is decreased by \$2.00, the amount withheld on community interest received by the estate of your husband which is not taxable to you.

COMPUTATION OF ALTERNATIVE TAX
(Section 117 (e) - I. R. C.)

Net income	\$35,028.23
Plus: Net long-term capital loss	9,613.30
Ordinary net income	<u>\$44,641.53</u>
Less: Personal Exemption	800.00
Balance (surtax net income)	<u>\$43,841.53</u>
Less: Earned income credit	300.00
Net income subject to normal tax.....	<u>\$43,541.53</u>
Normal tax at 4 per cent on \$43,541.53.....	\$ 1,741.66
Surtax on 43,841.53.....	<u>9,322.95</u>
Partial tax	<u>\$11,064.61</u>
Minus: 30 per cent of net long-term loss.....	2,883.99
Alternative tax	<u>\$ 8,180.62</u>

COMPUTATION OF TAX

Net income adjusted	\$35,028.23	
Less: Personal exemption	800.00	
Balance (surtax net income)	<u>\$34,228.23</u>	
Less: Earned income credit (10% of \$3,000.00).....	300.00	
Net income subject to normal tax.....	<u>\$33,928.23</u>	
Normal tax at 4% on \$33,928.23.....	\$ 1,357.13	
Surtax on \$34,228.23.....	<u>5,975.32</u>	
Total tax (ordinary rates)	<u>\$ 7,332.45</u>	
Total tax (alternative tax in case of net long-term gain or loss)	<u>\$ 8,180.62</u>	
Defense tax (10% of \$8,180.62).....	818.06	
Total income and defense taxes	<u>\$ 8,998.68</u>	
Less:		
(h) Income tax paid at source	\$ 20.00	
Income tax paid to a foreign country or U. S. Possession	39.00	59.00
Correct income tax liability	<u>\$ 8,939.68</u>	
Income tax assessed:		
Original, account No. 854745—First California.....	7,869.45	
Deficiency of income tax	<u>\$ 1,070.23</u>	

STELLA WHEELER BISHOP

Gain or Loss from Sale of Capital Assets held by the Executors of the Estate of Roy N. Bishop During the Year 1940 Which Property Constituted Community Property in Which Mrs. Bishop had an Equal Existing and Present Interest

	Shares	Date Acquired	Date Sold	Sales Price	Cost	Expenses	Gain or Loss
American Cyanamid Co. "B"	50	7-24-37	3-19-40	\$ 1,906.25	\$ 1,700.25	\$ 13.10	\$ 192.90
American Locomotive Company	30	7-24-37	3-20-40	615.00	1,436.45	7.80	825.25
Bliss, E. W. Co.	100	7-24-37	3-18-40	1,462.50	1,680.25	19.30	237.05
Caterpillar Tractor Co.	30	7-26-37	3-18-40	1,522.50	2,974.20	9.00	1,460.70
Houston Oil Co. of Texas.....	100	7-24-37	4- 2-40	562.50	1,592.75	13.30	1,043.55
Hudson Bay Mining & Smelting Co.	50	7-27-37	3-18-40	1,162.50	1,587.75	12.80	438.05
Kennebec Copper Corp.	30	7-24-37	3-21-40	1,091.25	1,772.62	7.50	688.87
Link Belt Co.	40	7-26-37	4- 4-40	1,505.00	2,365.35	10.60	870.95
Ohio Oil Company	150	7-24-37	3-28-40	1,043.75	3,107.95	20.80	2,085.00
Phillips Petroleum Co.	70	7-24-37	3-18-40	2,738.75	4,463.15	17.50	1,741.90
Pure Oil Company	500	10-29-37	3-18-40	4,687.50	7,587.50	81.50	2,981.50
Remington Rand, Inc.	1,000	10-29-37	3-18-40	9,912.50	16,012.50	172.00	6,272.00
Simmons Company	50	7-26-37	3-18-40	1,068.75	2,519.15	12.80	1,463.20
Suisun Slough Land Co.	60	4-20-31	7-11-40	785.83	11,800.00	11.18	11,025.35
Westinghouse Airbrake Co.	30	7-26-37	4- 3-40	723.75	1,332.10	7.80	616.15
Youngstown Sheet & Tube Co.....	40	7-24-37	3-28-40	1,625.00	3,740.55	10.60	2,126.15
Total.....				\$32,413.33	\$65,672.52	\$427.58	\$33,686.77

[Printer's Note]: Figures in italic printed in red.

EXHIBIT C

COMPUTATION OF AMOUNT OF REFUND
DUE PETITIONER

Net Income as disclosed by return.....		\$30,155.91
Additions:		
Adjustment (b)	\$ 2.83	
Adjustment (e)-3	39.53	
Kennecott Copper Co. dividend adjust- ment—par. V-h of petition	2.95	45.31
		<hr/>
		\$30,201.22
Deductions:		
Adjustment (e)-2		2,521.81
		<hr/>
Net income as adjusted.....		\$27,679.41

COMPUTATION OF ALTERNATIVE TAX
(Section 117(e) I.R.C.)

1. Net income		\$27,679.41
2. Plus: net long-term capital loss		18,034.99
		<hr/>
		\$45,714.40
3. Less: personal exemption		800.00
		<hr/>
4. Surtax net income		\$44,914.40
5. Less: earned income credit		300.00
		<hr/>
6. Net income subject to normal tax.....		\$44,614.40
7. Normal tax (4% of item 6).....		1,784.58
8. Surtax (\$9,380.00 plus 40% of \$914.40).....		9,745.76
		<hr/>
9. Partial tax under §117(e) I.R.C.....		\$11,530.34
10. Less: 30% x \$18,034.99		5,410.50
		<hr/>
11. Alternative tax		\$ 6,119.84

COMPUTATION OF TAX WITHOUT REFERENCE
TO SECTION 117 (c)

1. Net income as adjusted	\$27,679.41	
2. Less: personal exemption	800.00	
		<hr/>
3. Surtax net income	\$26,879.41	
4. Less: earned income credit	300.00	
		<hr/>
5. Net income subject to normal tax.....	\$26,579.41	
6. Normal tax (4% of item 5)	1,063.17	
7. Surtax (\$3,440.00 plus 30% of \$879.41).....	3,703.82	
		<hr/>
8. Total tax	\$ 4,766.99	
		<hr/>
Income tax	\$ 6,119.84	
Defense tax (10%)	611.98	
		<hr/>
	Total.....	\$ 6,731.82
Less:		
Income tax paid at source	\$ 22.00	
Income tax paid to a foreign country or		
U. S. possession	39.00	61.00
		<hr/>
Correct tax liability for 1940.....	\$ 6,670.82	
Amount paid	\$ 7,869.45	
		6,670.82
		<hr/>
Amount of refund payable	\$ 1,198.63	

[Endorsed]: T.C.U.S. Filed April 20, 1944.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the

above-named petitioner, admits and denies as follows:

I.

Admits the allegations contained in paragraph I. of the petition.

II.

Admits the allegations contained in paragraph II. of the petition.

III.

Admits that the taxes in controversy are income taxes for the calendar year 1940 in the amount of \$1,070.23, but denies the remaining allegations contained in paragraph III. of the petition.

IV.

1 to 5, inclusive. Denies that the Commissioner erred in the determination of the deficiency, as alleged in subparagraphs [20] 1 to 5, inclusive, of paragraph IV. of the petition.

V.

(a) to (c), inclusive. For lack of information, denies the allegations contained in subparagraphs (a) to (c), inclusive of paragraph V. of the petition.

(d) Admits that on March 18, 19, 20, 21 and 28, 1940, April 2, 3 and 4, 1940, and July 11, 1940 the Estate of Roy N. Bishop, deceased, sold securities, the net proceeds of the sale from which constituted a loss which was deducted as a long-term capital loss on petitioner's return for the taxable year 1940 in the sum of \$8,421.69, but denies the remaining

allegations contained in subparagraph (d) of paragraph V. of the petition.

(e) Admits that during the year 1940 said Estate of Roy N. Bishop, deceased, paid transfer taxes of \$461.48 on the sale of securities, and also paid a tax of \$34.00 on an automobile, but denies the remaining allegations contained in subparagraph (e) of paragraph V. of the petition.

(f) Admits that during the year 1940 dividends and interest were received by said Estate of Roy N. Bishop from securities in various corporations held by said estate and from bank deposits therefor, but denies the remaining allegations contained in subparagraph (f) of paragraph V. of the petition.

(g) Admits that during the year 1940 petitioner was paid the sum of \$1,928.09 by the Estate of Roy N. Bishop, deceased, as and for a fee as executrix of said estate, but denies the remaining allegations contained in subparagraph (g) of paragraph V. of the petition.

(h) Admits the allegations contained in subparagraph (h) of paragraph V. of the petition, except that the allegation "hence taxpayer understated her 1940 income by \$39.53 and \$2.95, respectively, and that petitioner is therefore entitled to a refund of \$1,198.63, as computed in Exhibit C" attached to the petition, is specifically denied.

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed)

J. P. WENCHELL, TMM
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
Special Attorney, Bureau of
Internal Revenue

TMM/vg 5-8-44

[Endorsed]: T.C.U.S. Filed May 15, 1944. [22]

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that the following facts (in addition to the facts alleged by the petition on file herein that are admitted by the answer on file herein) shall be taken to be true and received as evidence for all purposes of this proceeding, without prejudice to the right of either party to introduce any further evidence not inconsistent with the facts herein stipulated:

(1) Petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of De-

ember, 1938, when said Roy N. Bishop died. Said [23] Roy N. Bishop and petitioner Stella Wheeler Bishop were residents of, and domiciled in, the State of California continuously from the year 1909 to the 20th day of December, 1938, in the case of said Roy N. Bishop, and to the present time in the case of petitioner.

(2) Between April 20, 1931 and October 29, 1937, petitioner and said Roy N. Bishop acquired securities of the kinds and in the amounts, and for the costs and on the dates, set forth in the schedule attached to this stipulation and marked "Exhibit A"; and none of said securities was disposed of until they were sold by petitioner Stella Wheeler Bishop and Crocker First National Bank of San Francisco, as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, as hereinafter set forth.

(3) Thereafter, on December 20, 1938, said Roy N. Bishop died and on January 9, 1939, the Will of said Roy N. Bishop, deceased, was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. Said Will named petitioner and Crocker First National Bank of San Francisco as executrix and executor, respec- [24] tively, of the Will and estate of said Roy N. Bishop, deceased.

(4) Thereafter, petitioner Stella Wheeler Bishop and Crocker First National Bank of San Francisco, as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, deceased, sold the securities referred to in paragraph 2 of this stipula-

tion, for the amounts and on the dates set forth in said "Exhibit A". In making such sales, the expenses set forth in the sixth column of said "Exhibit A" were incurred. The net proceeds of the sale of such securities were \$33,686.77 less than the cost thereof as appears from the fourth, fifth and sixth columns of said "Exhibit A." The fair market value of said securities on December 20, 1938 is set forth in the eighth column of said "Exhibit A"; and the net proceeds of sale of said securities was \$7,749.40 less than the fair market value thereof on December 20, 1938.

(5) At the time said Roy N. Bishop died, and at all times herein mentioned prior thereto, the securities referred to in paragraphs (2) and (4) of this stipulation, the securities and automobile referred to in paragraph V(e) of the petition on file herein, and the securities and bank deposits referred to in paragraph V(f) of said petition, constituted community property of said Roy N. Bishop and petitioner acquired subsequent to July 29, 1927 and no part thereof was [25] acquired as or from the proceeds of any property owned by said Roy N. Bishop and petitioner, or either of them, on or before July 29, 1927.

(6) The transfer taxes and automobile tax referred to in paragraph V(e) of the petition on file herein, the executrix fee referred to in paragraph V(g) of the petition on file herein, and the funds used to pay the expenses of sale of the securities referred to in paragraphs (2) and (4) of this stipulation, were all paid either out of funds on

hand at the time said Roy N. Bishop died, and at such time and at all times prior thereto, constituting community property of petitioner and said Roy N. Bishop acquired subsequent to July 29, 1927, or were paid out of funds representing the proceeds of or income from such property; and no part of such funds was acquired prior to July 29, 1927 or as proceeds of income from any property owned by said Roy N. Bishop and petitioner, or either of them, on or before July 29, 1927.

(7) Petitioner filed her federal income tax return for the calendar year 1940 on March 15, 1941, and on the same day paid the amount of tax shown to be due thereon, to wit, \$7869.45.

Dated September 18, 1944.

HERMAN PHLEGER,
THEODORE R. MEYER,
ROBERT H. WALKER,
Counsel for Petitioner.

J. P. WENCHEL, TMM
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent. [26]

EXHIBIT A

26

	1	2	3	4	5	6	7	8	
								December 30, 1933	
	Shares	Date Acquired	Date Sold	Sales Price	Cost	Expenses	Gain or Loss	Fair Market Value	
American Cynamid Co. "B"	50	7-24-37	3-19-40	\$1,906.25	\$ 1,700.25	\$ 13.10	\$ 192.90	\$ 1,350.00	
American Locomotive Company.....	30	7-24-37	3-20-40	615.00	1,436.45	7.80	<i>829.25</i>	817.50	
Bliss, E. W. Co.	100	7-24-37	3-18-40	1,462.50	1,680.25	19.30	<i>237.05</i>	1,262.50	
Caterpillar Tractor Co.	30	7-26-37	3-18-40	1,522.50	2,974.20	9.00	<i>1,460.70</i>	1,357.50	
Houston Oil Co. of Texas.....	100	7-24-37	4- 2-40	562.50	1,592.75	13.30	<i>1,043.55</i>	737.50	
Hudson Bay Mining & Smelting Co.	50	7-27-37	3-18-40	1,162.50	1,587.75	12.80	<i>438.05</i>	1,631.25	
Kennecott Copper Corp.	30	7-24-37	3-21-40	1,091.25	1,772.62	7.50	<i>688.87</i>	1,262.65	
Link Belt Co.	40	7-26-37	4- 4-40	1,505.00	2,365.35	10.60	<i>870.95</i>	1,760.00	
Ohio Oil Company	150	7-24-37	3-28-40	1,043.75	3,107.95	20.80	<i>2,085.00</i>	1,406.25	
Phillips Petroleum Co.	70	7-24-37	3-18-40	2,738.75	4,463.15	17.50	<i>1,741.90</i>	2,940.00	
Pure Oil Company	500	10-29-37	3-18-40	4,687.50	7,587.50	81.50	<i>2,981.50</i>	5,187.50	
Remington Rand, Inc.	1,000	10-29-37	3-18-40	9,912.50	16,012.50	172.00	<i>6,272.00</i>	15,500.00	
Simmons Company	50	7-26-37	3-18-40	1,068.75	2,519.15	12.80	<i>1,463.20</i>	1,575.00	
Suisun Slough Land Co.	60	4-20-31	7-11-40	785.83	11,800.00	11.18	<i>11,025.35</i>		
Westinghouse Airbrake Co.	30	7-26-37	4- 3-40	723.75	1,332.10	7.80	<i>616.15</i>	862.50	
Youngstown Sheet & Tube Co.....	40	7-24-37	3-28-40	1,625.00	3,740.55	10.60	<i>2,126.15</i>	2,085.00	
Total.....				\$32,413.33	\$65,672.52	\$427.58	\$33,686.77	\$39,735.15	

[Printer's Note]: Figures in italic printed in red.

[Endorsed]: T.C.U.S. Filed Sept. 18, 1944.

[Title of Tax Court and Cause.]

Promulgated January 16, 1945

Held, that one-half of the loss sustained upon the sale, in the course of administration, of securities acquired since 1927 and owned as community property in California, is not deductible in the return of the surviving spouse. *Commissioner v. Larson*, 131 Fed. (2d) 85; *Estate of James F. Waters*, 3 T. C. 407, followed.

Robert H. Walker, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

The respondent determined a deficiency of \$1,070.23 in the petitioner's income tax for the year 1940. The petitioner cites as error respondent's action in denying as a deduction one-half of a loss sustained upon the sale by her husband's executor of securities acquired since 1927 and owned as community property; one-half of the taxes and expenses paid by the executors of her husband's estate and the elimination from the petitioner's income of one-half of the executrix' fee received by her. Consistent with these [28] claims petitioner's position is that one-half of the income from taxable dividends and interest received by the estate during the administration is taxable to her.

FINDINGS OF FACT

The facts were stipulated and as so stipulated they are adopted as findings of fact. In so far as they are material to the issue, they are as follows:

The petitioner is an individual residing in San Francisco, California. She filed her income tax re-

turn for the year 1940 with the Collector of Internal Revenue for the first district of California.

The petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of December, 1938, when Roy N. Bishop died. Roy N. Bishop and the petitioner, Stella Wheeler Bishop, were residents of, and domiciled in, the State of California continuously from the year 1909 to the 20th day of December, 1938. The petitioner has continued that status to the present time.

Between April 20, 1931 and October 29, 1937, the petitioner and Roy N. Bishop acquired certain securities at an aggregate cost of \$65,672.52. Such securities were not disposed of until they were sold by the petitioner and Crocker First National Bank of San Francisco, hereinafter called the bank, as executrix and executor, respectively, of the will and estate of Roy N. Bishop.

Thereafter, on December 20, 1938, Roy N. Bishop died and on January 9, 1939, his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. The will named the petitioner and the bank as executrix and executor, respectively, of the will and estate of said Roy N. Bishop, deceased.

Thereafter, the petitioner and the bank, as executrix and executor, respectively, of the said estate, sold the securities heretofore mentioned at an aggregate loss of \$33,686.77.

At the time Roy N. Bishop died, and at all times herein mentioned prior thereto, the securities above

referred to, an automobile on which the estate paid a tax of \$34, and certain other securities and bank deposits, on which dividends and interest were received by the estate in 1940, constituted community property of Roy N. Bishop and the petitioner acquired subsequent to July 29, 1927, and no part thereof was acquired as or from the proceeds of any property owned by Roy N. Bishop and the petitioner, or either of them, on or before July 29, 1927. During 1940 the estate paid transfer taxes of \$461.48 on such property and an automobile tax of \$34, and it received dividends of \$4,299.11 from securities and interest amounting to \$132.15 on bonds and bank deposits belonging to the estate. It was agreed that the dividends from Pacific Lumber Company were nontaxable to the amount of 28.495 per cent. During that year the petitioner received a fee of \$1,928.09 as executrix of the estate.

The transfer taxes and automobile tax, the executrix fee, and the funds used to pay the expenses of sale of the securities, were all paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto, constituting community property of the petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or were paid out of funds representing the proceeds of or income from such property. No part of such funds was acquired prior to July 29, 1927, or as proceeds of or income from any property owned by Roy N. Bishop and the petitioner, or either of them, on or before July 29, 1927.

In her income tax return for 1940, the petitioner claimed \$8,421.69 as one-half of the recognizable loss from the sale of securities and a [30] deduction of \$247.74 representing one-half of the taxes so paid. She reported as income her one-half of the dividends and interest so received. She also reported her one-half of her fee as executrix.

The Commissioner disallowed the deductions claimed, excluded from her income the dividend and interest items and included therein the entire sum received as her fee as executrix.

The petitioner claimed credit for income tax of \$22 paid at the source but the Commissioner reduced such sum to \$20 on the ground that \$2 applied to community property interest received by the estate.

OPINION

Arundell, Judge: The basic issue in this case presents a clear-cut question whether one-half of the loss upon the sale of community property acquired since 1927 in California while the estate of the husband is in the process of administration can be taken as a deduction by the surviving spouse.

While the precise question presented for decision has not been directly decided by the 9th Circuit Court of Appeals, we think that the Court's decision in *Commissioner v. Larson*, 131 Fed. (2d) 85, would require an answer contrary to petitioner's contention. In that case the Court had under consideration a Washington statute substantially similar to the California statute here involved and in its opinion reached the conclusion that because the

entire estate was subject to administration in the estate of the deceased husband, the income was "owned" by the executor or administrator and should be returned in its entirety by him. The same question was implicit in this Court's decision in the Estate of James F. Waters, 3 T.C. 407, though the question was not there directly decided.

We have always felt particularly impelled to strictly follow a Circuit Court's decision on questions of local law peculiarly within its knowledge and experience. *Helvering v. Stuart*, 317 U.S. 154. As we understand *Commissioner v. Larson*, *supra*, and *Rosenberg v. Commissioner*, 115 Fed. (2d) 910, which latter case was also decided by the 9th Circuit, the income from community property during the period of the administration is taxable in its entirety to the executor or administrator and one-half of it may not be returned by the surviving spouse.

It follows that the entire loss resulting from the sale of securities by the executor must be taken as a deduction by the latter and one-half of the loss may not be deducted by the surviving spouse in computing her tax. The same treatment must be accorded the expenses and taxes paid by the executor, which requires their deduction in full by the executor and no part of them may be deducted by the petitioner.

In another issue the petitioner asks to be relieved from including in her income one-half of the fee received by her as executrix of her husband's estate. We see no merit in her contention. The fee was paid to her for personal services rendered in her

personal capacity as a fiduciary. We may assume that the amount of the fee was fixed by the probate court as proper compensation for such services performed in connection with the settlement of the Roy N. Bishop Estate and that the action of the court was completely in accord with the significance and effect of the community property laws of California. Petitioner has not proved the fee to be in part excludible from her income. Therefore, the full amount of the fee must be included in her taxable income.

Reviewed by the Court.

Decision will be entered under Rule 50. [32]

Van Fossan J., dissenting: The majority opinion concedes that the precise question here posed has not been decided by either the Circuit Court of Appeals for the Ninth Circuit nor by The Tax Court, but nevertheless feels bound by the rationale of *Commissioner v. Larson*, 131 Fed. (2d) 85, and *Estate of James F. Waters*, 3 T.C. 407. Feeling that these cases are not authority for the conclusion reached by the majority, I must dissent. I shall set out my views at some length.

It may be helpful to place the situation existing in California before 1927 and that obtaining after that date in juxtaposition. Prior to 1927, during the lifetime of the husband the wife had only an expectancy in community property. Thereafter, "the respective interests of husband and wife in community property during continuance of the marriage relation are present, existing and equal interest under the management and control of the

husband.” (Section 161a, Civil Code of California)¹. Prior to 1927 all income from community property was taxable to the husband. *United States v. Robbins*, 269 U.S. 315. Thereafter, the wife was entitled to return for taxation one-half of the income from the community property. *United States v. Malcolm*, 282 U. S. 792. Prior to 1923, Section 1402, Civil Code of California, provided, “upon the death of the husband one-half of [33] the community property *goes* to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants * * *.” Since 1923 the statutes of California have provided, “upon the death of either husband or wife, one-half of the community property *belongs* to the surviving spouse; the other half is subject to the testamentary disposition of the decedent * * *.”² [Italics supplied.]

¹The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. [Section 161a, Civil Code of California.]

²Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. [Section 201, Probate Code of California.]

If anything is basic in income tax law, it is that ownership of property determines the taxability of income earned by, or derived from, it. *Blair v. Commissioner*, 300 U. S. 5; *Helvering v. Clifford*, 309 U. S. 331. See *Poe v. Seaborn*, 182 U. S. 101, where the Supreme Court held that a husband's power of control over community property under Washington law does not amount to ownership of the entire community property, stating, "the law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner", and departing from the alternative reasoning employed in *United States v. Robbins*, *supra*. The court laid down the proposition that the word "of" in the phrase "the net income of every individual" denotes ownership and that ownership is the test of taxability.

Since 1927 the interests of husband and wife in community property in California have been "present, existing and equal". Each owns one-half and is entitled to return one-half of the income. *United States v. Malcolm*, [34] *supra*. Since 1923 it has been the law of California, as provided by section 201 of the Probate Code, that "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse." These are words of ownership, definite, certain and absolute. The share of the surviving spouse is not includible in the taxable estate of the decedent. *United States v. Goodyear*, 99 Fed. (2d) 523. The logic of the situation would seem to be irresistible. If, because of ownership of the property, and not-

withstanding control of the same by the husband, each spouse is entitled to return one-half of the income therefrom during the existence of the marriage relationship and since by the statute the surviving widow owns one-half of the community property after the death of her husband and notwithstanding the control by the executor during administration, such one-half is exempted from estate tax, she should be entitled to return as her own the income from such property during administration.

In *Commissioner v. Larson*, 131 Fed. (2d) 85, the case chiefly relied on by the majority, arising in the State of Washington, the income from community property during the administration was involved. There the court said:

We think the test of ownership is applicable here. In determining who the owner of the income is, state law is apparently applicable. We therefore turn to state law to determine whether the executor alone, or the executor and the surviving spouse together, own the community income.

Pierce's Code, 1933, §9863, provides that title to realty vests immediately in the heirs or devisees who are entitled to the rents, issues and profits thereof as against "any person except the executor or administrator and those lawfully [35] claiming under such executor, or administrator". By §9885 the executor or administrator is entitled to institute suit to collect any debts due the estate or to recover any property, real or personal. It has been repeatedly said that upon the death of either spouse, the entire community estate, and not merely the half interest

of decedent, is subject to administration. In addition, title to the personal property vests in the executor or administrator. *Deveraux v. Anderson*, 146 Wash. 651, 264 P. 423, 424.

The court then held that under the provisions of Washington statutes, the ownership of the income from community property during administration and liquidation was in the executor or administrator and that he should report the income in the return of the estate. Although the decision was adverse because of State law, the reasoning of the opinion clearly supports the conclusion that ownership is the controlling factor.

Under the statutes of California, the surviving spouse acquired the ownership of one-half of the community property at the time of purchase (Section 161a, Civil Code of California) and continued to own that interest after the death of the other spouse (Section 201, Probate Code), thus presenting a very different situation.

The Estate of James F. Waters, 3 T.C. 407, is not inconsistent with this view.³ There the estate re-

³Section 581, Probate Code of California, was cited (in error, I believe) to support the dictum in the Waters case that "the income from the entire community property during the period of administration goes to the executor or administrator." The statute reads: "The executor or administrator is entitled to the possession of all of the real and personal property of the decedent and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees * * *." The section

turned all of the income. In the notice [36] of deficiency the Commissioner, obviously relying on G.C.M. 20742 then in effect, divided the income one-half to the estate and one-half to the widow, but held that the basis for gain on the widow's one-half of the property was the fair market value at date of death and not cost to the community, as claimed by the taxpayer. At the hearing, again obviously relying on G.C.M. 23811, which had revoked G.C.M. 20742, counsel for the Commissioner reversed his position, abandoned his contention that the income should be returned one-half by each the estate and the widow, and embraced the theory of the tax return, i. e., that the estate should return all of the income. The parties were thus in agreement that a single return by the estate should be made and posed for our decision only the narrow question of the basis of the property belonging to the widow.

Viewing the agreed posture of the parties as presenting no issue, we decided that as to the widow's share the basis was the cost to the community, as adjusted, and not the market value at the time of the husband's death. A word of warning was uttered as to possible implications of the opinion by

obviously relates only to the property of the decedent and does not include the community property owned by the other spouse. Section 202, Probate Code, provides: "Community property passing from the control of the husband either by reason of his death or by virtue of testamentary disposition by the wife is subject to his debts and to administration and disposal under the provisions of Division III of this Code; * * *."

Judge Opper in a concurring opinion but being in agreement with the result reached on the narrow question presented, he did not dissent. When the narrowness of the issue is remembered and the posture of the parties is appreciated, the conclusion reached is thought to support, rather than oppose, the view I take in the case at bar. In both the prevailing and concurring opinions the controlling thought is the ownership of the property.

Two other cases are relied on by the respondent. They are *Rosenberg v. Commissioner*, 115 Fed. (2d) 910, and *Barbour v. Commissioner*, 89 Fed. (2d) 434. [37]

The *Rosenberg* case dealt exclusively with the rights of the surviving spouse in California community property acquired prior to 1927 when the wife had a mere expectancy and does not purport to decide the question presently before us.

The *Barbour* case arose in Texas, where the State law (Article 3630, Revised Civil Statutes of Texas, 1925) provides that "until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto." The California law contains no such provision but, as above pointed out, by Section 201, Probate Code of California, decrees that upon the husband's death one-half of the community "*belongs to the surviving spouse.*" [Italics supplied.]

The law of California confirms in the surviving spouse the ownership of one-half of the community property. I am of the opinion that such ownership

entitles her to report one-half of the income of such community property. It follows that the petitioner should be entitled to deduct from her gross income one-half of the loss sustained on the sale of the community property securities during the period of administration.

Mellott, Arnold, Disney and Opperz, J.J., agree with this dissent. [38]

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

(Signed) J. P. WENCHEL, TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

C:TS:PD Recomp.

SF:TMM:WPE

AUDIT STATEMENT

In re Stella Wheeler Bishop
San Francisco, California

Docket No. 4594

Deficiency letter dated February 29, 1944

Tax Liability for the Taxable Year Ended December 31, 1940

	Liability	Assessed	Deficiency
Income Tax	\$8,939.68	\$7,869.45	\$1,070.23

Recomputation of tax liability prepared in accordance with the opinion of The Tax Court of the United States promulgated January 16, 1945.

ADJUSTMENT TO NET INCOME

Net income as disclosed in the deficiency notice dated February 29, 1944	\$35,028.23
Adjustment made in accordance with the opinion of The Tax Court of the United States promulgated January 16, 1945	None

COMPUTATION OF ALTERNATIVE TAX

(Section 117 (c) - I. R. C.)

Net income	\$35,028.23
Plus: Net long-term capital loss.....	9,613.30
Ordinary net income	\$44,641.53
Less: Personal exemption	800.00
Balance (surtax net income)	\$43,841.53
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$43,541.53
Normal tax at 4 per cent on \$43,541.53.....	\$ 1,741.66
Surtax on \$43,841.53.....	9,322.95
Partial tax	\$11,064.61
Minus: 30 per cent of net long-term loss.....	2,883.99
Alternative tax	\$ 8,180.62

COMPUTATION OF TAX

Net income adjusted	\$35,028.23
Less: Personal exemption	800.00
	<hr/>
Balance (surtax net income)	\$34,228.23
Less: Earned income credit (10% of \$3,000.00).....	300.00
	<hr/>
Net income subject to normal tax.....	\$33,928.23
Normal tax at 4% on \$33,928.23.....	\$ 1,357.13
Surtax on \$34,228.23.....	5,975.32
	<hr/>
Total tax (ordinary rates)	\$ 7,332.45
Total tax (alternative tax in case of net long-term gain or loss)	\$ 8,180.62
Defense tax (10% of \$8,180.62)	818.06
	<hr/>
Total income and defense taxes.....	\$ 8,998.68
Less:	
Income tax paid at source	\$ 20.00
Income tax paid to a foreign country or U. S. Possession	39.00 59.00
	<hr/>
Correct income tax liability	\$ 8,939.68
Income tax assessed:	
Original, account No. 854745—First California.....	\$ 7,869.45
	<hr/>
Deficiency of income tax	\$ 1,070.23

WPE:em - 2/2/45

[Endorsed]: T.C.U.S. Filed Feb. 15, 1945.

The Tax Court of the United States
Washington

Docket No. 4594

STELLA WHEELER BISHOP,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Opinion of the Court promulgated January 16, 1945, the respondent herein, on February 15, 1945, filed a recomputation for entry of decision. Hearing was had thereon on March 28, 1945, at which time the recomputation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That for the calendar year 1940 there is a deficiency in income tax in the amount of \$1,070.23.

Entered March 29, 1945.

[Seal] (Signed) C. R. ARUNDELL

Judge. [43]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

JURISDICTION AND VENUE

Your petitioner, Stella Wheeler Bishop, respectfully petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision and order of The Tax Court of the United States rendered on March 29, 1945, in the above proceeding, finding a deficiency of income tax due from your petitioner in the amount of \$1,070.23 for the calendar year 1940.

The return of income tax in respect of which said alleged tax liability arose was filed by your petitioner on March 15, 1941, with the Collector of Internal Revenue for the [44] First Collection District of California, located in the City and County of San Francisco, California, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

Jurisdiction in this court to review said decision of The Tax Court of the United States is founded on Sections 1141 and 1142 of the Internal Revenue Code.

II.

NATURE OF THE CONTROVERSY

Petitioner and Roy N. Bishop, deceased, were married on May 9, 1907, and remained married continuously thereafter until December 20, 1938, when Roy N. Bishop died. From 1909 to the latter date petitioner and Roy N. Bishop were residents of and domiciled within the State of California.

At the time Roy N. Bishop died, he and petitioner were the owners of certain corporate stocks which constituted community property under the laws of the State of California, acquired after July 29, 1927. In the year 1940, while the administration of the Estate of Roy N. Bishop, Deceased, was still pending, petitioner and Crocker First National Bank of San Francisco, as executors of his will, sold said stocks for a sum of \$33,686.77 less than their cost.

The Commissioner of Internal Revenue determined, and the Tax Court held, that the entire loss on the sale of said stocks was deductible in computing the net income of the Estate of Roy N. Bishop, Deceased, for the year 1940, and that no part thereof was deductible by petitioner in computing her net income [45] for the year 1940.

Petitioner was the owner of an undivided one-half interest in said stocks during the life of Roy N. Bishop; her ownership continued after his death and was not divested thereby; and she contends that as such owner she was entitled to deduct one-half of the loss sustained on the sale of said stocks, in computing her net income for the year 1940.

The Commissioner also determined, and the Tax Court held, that petitioner was taxable upon the full amount, to-wit \$1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. Said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid, and petitioner contends that consequently only one-half of said fee constituted income taxable to her.

The Commissioner also determined, and the Tax Court held, that transfer taxes of \$461.48 paid by the Estate of Roy N. Bishop, Deceased, on the sale of securities which at the time of the death of Roy N. Bishop constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927, and a tax of \$34.00 paid by said estate on an automobile constituting such community property, were deductible solely by the estate, [46] and no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time Roy N. Bishop died and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an un-

divided one-half interest in and to such securities and said automobile, and in and to the funds from which said taxes were paid, and petitioner contends that she was consequently entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Commissioner determined, and the Tax Court held, that the Estate of Roy N. Bishop, Deceased, was entitled to the full amount of a credit of \$4 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or \$2.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of \$1,198.63 for the year 1940, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

Wherefore, your petitioner prays that this Honorable [47] Court may review said decision and order of The Tax Court of the United States and reverse the same, and remand the proceeding to The Tax Court of the United States for a determination of the amount of the refund to which petitioner is entitled for the year 1940, and for the entry of such further orders and directions as shall

by this court be deemed meet and proper in accordance with law.

Dated June 13, 1945.

Respectfully submitted,

HERMAN PHLEGER

THEODORE R. MEYER

ROBERT H. WALKER

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [48]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Commissioner of Internal Revenue, and to the Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that on the 18th day of June, 1945, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above entitled cause was filed with the Clerk of The Tax Court of the United States. A copy of the petition as filed is attached hereto and served upon you.

Dated June 18, 1945.

HERMAN PHLEGER

THEODORE R. MEYER

ROBERT H. WALKER

Attorneys for Petitioner [49]

Service and receipt of a copy of the foregoing Notice of Filing Petition for Review and of a copy of said Petition for Review attached thereto is hereby acknowledged by each of the undersigned this 18th day of June, 1945.

J. D. NEWMAN, Jr.

Commissioner of Internal
Revenue

J. P. WENCHELL

Chief Counsel, Bureau of In-
ternal Revenue
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [50]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Tax Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON
PETITION FOR REVIEW

Petitioner relies on the following points in petitioning for review of the decision of The Tax Court of the United States in the above entitled proceeding:

The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain corporate stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, deceased, was deductible by the Estate of Roy N. Bishop,

Deceased, in computing the net income of the estate for the year 1940, and that no part of the loss was deductible by petitioner. During the lifetime of Roy N. Bishop petitioner was the owner of an undivided one-half interest in and to said stocks, which constituted California community property acquired after July 29, 1927; her ownership was not divested by the death of Roy N. Bishop; and petitioner contends that as the owner of an undivided [51] one-half interest in and to said stocks she was entitled to deduct one-half the loss sustained thereon in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that petitioner was taxable on the full amount, to-wit, \$1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid; and petitioner contends that consequently only one-half of such fee constituted income taxable to her.

The Tax Court of the United States also erred in deciding that transfer taxes of \$461.48 paid by the Estate of Roy N. Bishop on the sale of securities which constituted community property of petitioner and Roy N. Bishop at the time of his

death, and which were acquired after July 29, 1927, and a tax of \$34.00 paid by said estate on an automobile constituting such community property, were deductible by the estate, and that no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time said Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and said Roy N. Bishop acquired [52] subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner contends that since she was the owner of an undivided one-half interest in and to said securities and said automobile, and in and to the funds out of which the said taxes were paid, she was entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that the Estate of Roy N. Bishop, Deceased, was entitled to the full amount of a credit for \$4 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or \$2.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of \$1,-

198.63, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner [53]

Service and receipt of a copy of the foregoing Statement of Points Relied Upon on Petition for Review is hereby acknowledged by each of the undersigned this 18th day of June, 1945.

J. D. NEWMAN, Jr.,
Commissioner of Internal
Revenue

J. P. WENCHEL,
Chief Counsel, Bureau of In-
ternal Revenue
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [54]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Tax Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of The Tax Court of the United
States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, copies of the following documents and records in the above-entitled cause, duly certified as correct, in connection with the petition for review by the said United States Circuit Court of Appeals, for the Ninth Circuit, heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before The Tax Court of the United States.
2. Petition filed on April 20, 1944.
3. Answer to Petition, filed on May 15, 1944.
4. Stipulation of Facts, filed on September 18, 1944.
5. Findings of Fact and Opinion of the Court promulgated on January 16, 1945. [55]
6. Respondent's Computation for Entry of Decision, filed on February 15, 1945.
7. Order of Redeterminaiton of Deficiency entered on March 29, 1945.
8. Petition for Review, filed on June 18, 1945.
9. Notice of filing Petition for Review and the

Admission of Service thereof, filed on June 18, 1945.

10. Statement of Points Relied Upon on Petition for Review and the Admission of Service thereof, filed on June 18, 1945.

11. This designation of Portions of Record, Proceedings and Evidence to be Contained in Record on Review and the Admission of Service thereof.

Said copies of documents and records are to be prepared as required by law and the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner

Service and receipt of a copy of the foregoing Designation of Portions of Record, Proceedings and Evidence to be Contained in the Record on Review is acknowledged by each of the undersigned, this 18th day of June, 1945.

J. D. NEWMAN, Jr.,
Commissioner of Internal
Revenue

J. P. WENCHEL
Chief Counsel, Bureau of In-
ternal Revenue
Attorney for Respondent

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 56, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 28th day of June, 1945.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11098. United States Circuit Court of Appeals for the Ninth Circuit. Stella Wheeler Bishop, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 16, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11098

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS RELIED UPON ON
PETITION FOR REVIEW AND DESIGNATION OF RECORD NECESSARY FOR
THE CONSIDERATION THEREOF

Petitioner relies on the following points in petitioning for review of the decision of The Tax Court of the United States in the above entitled proceeding:

The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain corporate stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, Deceased, was deductible by the Estate of Roy N. Bishop, Deceased, in computing the net income of the estate for the year 1940, and that no part of the loss was deductible by petitioner. During the lifetime of Roy N. Bishop petitioner was the owner of an undivided one-half interest in and to said stocks, which constituted California community property acquired after July 29, 1927; her ownership was not

divested by the death of Roy N. Bishop; and petitioner contends that as the owner of an undivided one-half interest in and to said stocks she was entitled to deduct one-half the loss sustained thereon in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that petitioner was taxable on the full amount, to-wit, \$1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. Said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid; and petition contends that consequently only one-half of such fee constituted income taxable to her.

The Tax Court of the United States also erred in deciding that transfer taxes of \$461.48 paid by the Estate of Roy N. Bishop on the sale of securities which constituted community property of petitioner and Roy N. Bishop at the time of his death, and which were acquired after July 29, 1927, and a tax of \$34.00 paid by said estate on an automobile constituting such community property, were deductible by the estate, and that no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time said Roy N. Bishop died, and at such time and at all times prior

thereto constituting community property of petitioner and said Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner contends that since she was the owner of an undivided one-half interest in and to said securities and said automobile, and in and to the funds out of which the said taxes were paid, she was entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that the Estate of Roy N. Bishop, Deceased, was entitled to the full amount of a credit for \$4.00 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or \$2.00.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of \$1,198.63, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

Petitioner hereby designates the entire record certified to the United States Circuit Court of Appeals for the Ninth Circuit as necessary for the consideration of the foregoing points, and hereby

requests the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to print the entire transcript of record.

THEODORE R. MEYER

ROBERT H. WALKER

Attorneys for Petitioner

[Endorsed]: Filed July 20, 1945. Paul P.
O'Brien, Clerk.